82-1474

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS FOR REVIEW

1. Petitioners were members of the Arizona Supreme Court's Committee on Examinations and Admissions. Were petitioners' acts in grading the Arizona bar examination immune from federal antitrust liability as direct action by the state itself?

2. Is this state action immunity dispelled because petitioners exercised discretion in grading the examination?

3. The Committee on Examinations and Admissions grades the bar examination and recommends to the Arizona Supreme Court that the court grant or deny admission to applicants. Are these acts immune from the federal antitrust laws under the *Noerr-Pennington* doctrine as efforts to influence official action?

4. Can a federal antitrust action be used to challenge a failing grade on a bar examination?

OTHER PARTIES BELOW[1]

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[1]Additional parties to this case in the Court of Appeals were as follows: James L. Richmond and George Read Carlock were members of the Committee on Examinations and Admissions and stand in the same position as petitioners. D. Thompson Slutes was a member of the Committee and was named as a defendant, but apparently was never served. The State Bar of Arizona was named as a defendant, as were the wives of each of the individual defendants (Wanda Carlock, Judith Myers, Jane Doe Wolfinger, Jane Doe Richmond, Jane Doe Slutes, Jane Doe Karman and Jane Doe Hoover). The Court of Appeals affirmed dismissal of the complaint as to the State Bar and each of the wives. *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 694 n. 1 (9th Cir. 1981). Petitioners do not challenge this portion of the Court of Appeals' decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

Table of Authorities Cited

Cases

Statutes and Rules

TABLE OF AUTHORITIES CITED

Books, Periodicals and Reports

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OPINIONS BELOW

The Court of Appeals' decision as amended on rehearing is published at 686 F.2d 692 and is reprinted in the Appendix. The Court of Appeals' original decision, entirely superseded by the amendment on rehearing, is published at 1981-2 Trade Cas. (CCH) ¶ 64,414.

No opinion was rendered by the United States District Court for the District of Arizona. Its order and judgment dismissing the action are reprinted in the Appendix.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its original judgment on December 14, 1981. A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed, and rehearing was granted on July 29, 1982.

A new judgment of the Court of Appeals was entered on September 8, 1982. A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed with respect to the new judgment. This petition was denied on December 2, 1982.

The petition for certiorari is filed within 90 days after December 2, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

United States Code, Title 15

Section 1. *Trusts, Etc., In Restraint Of Trade Illegal*

. . .

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Rules of the Arizona Supreme Court[2]

Rule 28. *Examination and Admission*

(a) The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court. . . . The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications

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[2]The quoted Rules were in effect in 1974; the Rules presently in force contain no changes material to the issues herein.

and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions. . . . The court will then consider the recommendations and either grant or deny admission.

(Amended effective September 15, 1970.)

. . .

(c)(VII)(B) The Committee on Examinations will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

(Amended effective January 15, 1974.)

STATEMENT OF THE CASE

Petitioners are Arizona attorneys. In 1974 they served under appointment by the Arizona Supreme Court on that court's Committee on Examinations and Admissions (the "committee").

Respondent Edward Ronwin took the Arizona bar examination in February 1974. He did not receive a passing grade. The committee recommended that the Arizona Supreme Court deny him admission to the Arizona bar.

Ronwin unsuccessfully petitioned the Arizona Supreme Court to review his examination, and was denied admission. He unsuccessfully petitioned this Court for a writ of

certiorari. *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974).[3]

Ronwin timely filed this action in the United States District Court for the District of Arizona, claiming federal jurisdiction under 15 U.S.C. § 15 and alleging that petitioners and the State Bar of Arizona violated section 1 of the Sherman Act by conspiring artificially to reduce the number of applicants admitted to practice in Arizona, thus restraining competition among attorneys in that state.

Allegedly, petitioners restricted admission by giving each applicant's paper a "raw score." Once these "raw scores" were known, petitioners chose a particular "raw score" as the passing grade. According to Ronwin, the number of applicants who passed thus depended on the "raw score" chosen as a passing grade "rather than [on the] achievement by each Bar applicant of a pre-set standard."

The district court dismissed Ronwin's complaint, holding that it failed to state a claim on which relief could be granted.[4]

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[3]Ronwin again applied to take the Arizona bar examination in July 1974. The Committee denied his application, being unable to certify him to be "mentally and physically able to engage in active and continuous practice of law." After a formal hearing on the question, a (different) special committee found Ronwin mentally unfit to practice law. The Arizona Supreme Court affirmed this finding. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976). This Court denied certiorari. 430 U.S. 907 (1977); 439 U.S. 828 (1978).

[4]The district court also held that it lacked subject matter jurisdiction and that Ronwin lacked standing to sue. It also denied Ronwin's recusal motion. The Court of Appeals affirmed the denial of recusal but reversed the other holdings. 686 F.2d at 698-700. These rulings are not challenged by this petition.

On Ronwin's appeal, the Court of Appeals reversed as to petitioners. See n. 1 above and 686 F.2d at 694 n. 1 as to other parties. The majority opinion rejected the argument that "the Committee's status as a state agent renders its actions absolutely immune from antitrust liability." 686 F.2d at 695. It held that the Committee's grading practices were not dictated by any "clearly articulated and affirmatively expressed state policy" and were not "actively supervised by the state itself," as it thought to be required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). 686 F.2d at 695-698.

Ferguson, J., dissented, reasoning that defendants acted as state officials in their capacity as bar examiners and were immune from antitrust liability because their acts were authorized "pursuant to a state policy to displace competition with regulation." 686 F.2d at 705-706.

REASONS FOR GRANTING THE WRIT

1. A Federal Antitrust Action Cannot Be Used to Challenge a Failing Grade on a Bar Examination

As this Court has held, "the regulation of the activities of the bar is at the core of the State's power to protect the public. . . . 'The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." ' [Citation.]" *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-362 (1977).

Recognizing "the importance of leaving States free to select their own bars," *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957), this Court and all lower federal courts have traditionally refrained from reviewing

state bar admissions decisions except within an exceedingly narrow constitutional ambit. *See, Theard v. United States,* 354 U.S. 278, 281 (1957).

As the Ninth Circuit has held elsewhere:

> Admission of applicants to the bar of a state is a matter of local concern. . . . The only constraints on the states' exclusive jurisdiction are constitutional in nature: a person may not be excluded from the practice of law in a manner or for reasons which contravene the Fourteenth Amendment, nor can the state court impose qualifications which lack "a rational connection with the applicant's fitness or capacity to practice law." [Citation.]

Brown v. Board of Bar Examiners, 623 F.2d 605, 609 (9th Cir. 1980).

Even when constitutional challenges to bar admissions practices have been raised, the federal courts have been reluctant to interfere. The constitutionality of bar admissions practices is determined by the relatively lax "rational relationship" test. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957); *and see, Tyler v. Vickery,* 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976); *Chaney v. State Bar of California,* 386 F.2d 962, 964 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968). The lower federal courts will not entertain even constitutional attacks on *individual* state bar admissions decisions; constitutional infirmities in a state's denial of admission to an individual applicant may be redressed only on a petition for writ of certiorari to this Court. *Brown v. Board of Bar Examiners, supra,* 623 F.2d at 609-610; *Doe v. Pringle,* 550 F.2d 596, 597-599 (10th Cir. 1976), *cert. denied,* 431 U.S. 916 (1977). Nor have the lower federal courts

permitted disappointed bar applicants to circumvent this rule by pleading a civil rights action under 42 U.S.C. § 1983. *Doe v. Pringle, supra,* 550 F.2d at 599.

The Court of Appeals' decision in this action overturns at a single stroke this long-established body of law which ensures state control over bar admissions. The holding in this case lets any disappointed bar applicant have a lower federal court and jury review his failing grade.

It is immaterial that Ronwin has sued petitioners, the bar examiners, rather than the Arizona Supreme Court. Like the high courts of all American jurisdictions, the Arizona Supreme Court now delegates to bar examiners the technical aspects of testing, grading and screening bar applicants. *The Bar Examiners' Handbook,* 15-16 (S. Duhl 2d ed. 1980); F. Klein, S. Leleiko & J. Mavity, *Bar Admission Rules and Student Practice Rules,* 30-33 (1978). In Arizona, however, as in each of the other American jurisdictions, the highest state court retains the ultimate power and authority to grant or deny admission. Bar examiners recommend; the high court decides. *See, Feldman v. State Board of Law Examiners,* 438 F.2d 699, 702 (8th Cir. 1971); *Application of Levine,* 97 Ariz. 88, 397 P.2d 205, 207 (1964); Ariz. Sup. Ct. Rule 28(a). A suit against bar examiners who assist the state supreme courts in the admissions process is the type of collateral attack on individual admission decisions which the lower federal courts have routinely rejected until now.

To subject the grading of bar examinations to federal antitrust review imperils the entire existing system of bar admissions. It will prevent the state supreme courts from delegating the testing, grading and screening function to

senior lawyers who have been serving voluntarily as bar examiners.

If this decision stands, the states' authority over the admissions process will yield to the overriding authority of the federal courts. Jurors, not judges or bar examiners, will have the last word on the fairness of bar examinations and the grading of each applicant's papers. Disappointed bar applicants are sure to seize the opportunity to prove to a jury that their examiners were wrong. The federal courts will, consequently, be clogged with new antitrust actions after each state bar examination.

Federal antitrust scrutiny of state bar examination practices will destroy the highly developed and professionalized bar admissions process. It will seriously disrupt the proper relationship between the state and federal courts.

At a time of widespread complaint that lawyers are insufficiently prepared and qualified,[5] the Court of Appeals' decision in this case would deprive the state courts of their best tool for assuring lawyer competence. This is exceptionally poor social policy. It is also wrong, since the Court of Appeals' opinion is based on a misreading of this Court's decisions on state action immunity from the federal antitrust laws and conflicts with the decisions of other courts of appeal.

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[5]*See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L.Rev. 227 (1973); Maddi, *Trial Advocacy Competence: The Judicial Perspective* (1978) A.B.F. Research J. 105; *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts* (1979), reprinted at 83 F.R.D. 215.

2. Grading Bar Examinations Is Action By the State Itself, Immune from the Antitrust Laws

a. The Midcal Test Does Not Apply to Action by State Agencies

The Court of Appeals' majority opinion reached the wrong answer in this case in large part because it asked the wrong question. The majority held that petitioners could claim state action immunity from the antitrust laws only by showing that "the challenged restraint [was] clearly articulated and affirmatively expressed as state policy and [that it was] actively supervised by the state itself." 686 F.2d at 696. This formula is a paraphrase of the test restated and applied by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (hereafter the "*Midcal* Test").

The Court of Appeals made a basic error by applying the *Midcal* Test to this case. That test is appropriately used *only* in antitrust cases challenging acts by political subdivisions below the state level, *e.g., City of Lafayette, La., v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40 (1982), or acts by private persons which have been directed, passed upon, submitted to or regulated by a state agency, *e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra.*

As the dissenting Circuit Judge pointed out, the *Midcal* Test is *not* appropriately applied in antitrust cases challenging acts by state agencies or officials. 686 F.2d at 705-

706. In such cases, the court looks only to see whether the "anticompetitive conduct [is] engaged in as an act of government by the State as sovereign . . . pursuant to state policy to displace competition with regulation." *City of Lafayette, La., v. Louisiana Power & Light Co., supra,* 435 U.S. at 413 (plurality opn.). "An adequate mandate for state anticompetitive activity exists when it is found, from authority given a [state] governmental entity to operate in a particular area, that 'the kind of action complained of' was contemplated. [Citation.]" 686 F.2d at 705-706 (Ferguson, J., dissenting below).

This Court observed when it first established the state action immunity that there was nothing in the language or history of the Sherman Act to suggest that the Act was intended "to restrain a state or its officers or agents from activities directed by its legislature" and noted that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown,* 317 U.S. 341, 350-351 (1943).

Since *Parker,* this Court has consistently drawn a distinction between state agencies' acts and the acts of others. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) makes this point clearly. Distinguishing *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), this Court noted that the minimum-fee schedule challenged in the latter case had been published by a county bar association and was enforced by the state bar. 433 U.S. at 359. In *Goldfarb,* this Court had concluded that "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent."

421 U.S. at 790, quoted at 433 U.S. at 359. But *Bates* presented a quite different situation:

> In the instant case, by contrast, the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power over the practice of law [citations], and, thus, the restraint is "compelled by direction of the State acting as a sovereign." [Citation.]

433 U.S. at 359-360.

Bates also distinguished *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) on the same grounds:

> [T]he context in which *Cantor* arose is critical. . . . *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. [Citation.] Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361; fn. omitted.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) and *Community Communications Co. v. City of Boulder, Colo., supra*, 455 U.S. 40 demonstrate the same distinction. In *Orrin W. Fox*, private parties initiated the restraint for their own benefit and the actor was a subordinate state agency. Its acts were immune because they

were taken under "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom." 439 U.S. at 109. In *Community Communications*, by contrast, because the actor was not the state but a municipality, it was not immune unless it met the *Midcal* test. 455 U.S. at ....., 102 S.Ct. 835, 842.

The lesson of these cases is that agencies and officials of the state itself are clothed with full antitrust immunity whenever they act pursuant to a state policy to displace competition with regulation.

Subordinate political subdivisions and private parties are differently placed in the federal system. They are not themselves sovereign, and *therefore* obtain state action immunity only when they meet both prongs of the *Midcal* Test, showing that their acts were taken pursuant to a clearly articulated and affirmatively expressed state policy and were actively supervised by the state.

By imposing a *Midcal* Test requirement on petitioners, the majority of the Court of Appeals committed a fundamental error, creating a conflict with the decisions of the courts of appeals for several other circuits. *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 716-719 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); *Foley v. Alabama State Bar*, 648 F.2d 355, 359 (5th Cir. 1981); and *Feldman v. Gardner*, 661 F.2d 1295, 1305-1306 (D.C.Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 3483 (1982), *cert. granted on another issue sub. nom., District of Columbia Court of Appeals v. Feldman*, ... U.S. ....., 102 S.Ct. 3481 (1982), all hold on facts closely similar to those in the instant case that the *Midcal* Test is not properly ap-

plied to action by the state itself.[6] As the *Feldman* decision states:

> [The] tests [developed in *Parker* and its progeny] require courts to ascertain whether there is a clear articulation of state policy accompanied by active supervision by the state. This inquiry becomes necessary when an act by a subordinate government agency is at stake, for it is well settled that not everything it does is an act of the state as sovereign. There obviously is no need for any investigation of that sort when the action plainly is taken in a sovereign capacity.
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> While activity of private parties prompted by purported state policies or pursuant to state regulatory schemes, or even acts of subordinate governmental agencies, are not always entitled to the shield of the state's antitrust exemption, acts of the state in its sovereign character are invulnerable.
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> • • • • •
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> [R]egulation by a state legislature of admission to the state's bar clearly would stand on an entirely different footing, as does that activity when conducted by a state court endowed with the "ultimate" authority to do so. In either case, the regulatory act brings to bear the sovereignty of the state, and immunity from federal antitrust liability attaches.

661 F.2d at 1305-1306; fns. omitted.

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[6] *See also, Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir.) *cert. denied*, ... U.S. ..., 103 S.Ct. 388 (1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-276 (9th Cir. 1982); Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 438 n. 19, 445 n. 49 (1981).

b. As Members of the Arizona Supreme Court's Committee on Examinations and Admissions, Petitioners Acted as State Officials

The grading practices which petitioners adopted in their role as court-appointed members of the Arizona Supreme Court's Committee on Examinations and Admissions were their acts as state officials, exercising the sovereign power of the State of Arizona over admissions to its bar. They were therefore not required to meet the *Midcal* Test to qualify for state action immunity from the antitrust laws.

Arizona Supreme Court Rule 28(a) creates the Committee on Examinations and Admissions as an arm of that court. Each of the committee's members is appointed by the Arizona Supreme Court. Rule 28(a) specifies that the committee's function is to examine applicants and recommend to the supreme court for admission those applicants the committee deems qualified.

In performing these functions, the committee assists the Arizona Supreme Court in exercising its judicial power to grant or deny admission to the Arizona bar. *See, In re Summers,* 325 U.S. 561, 565, n. 6 (1945). Such a committee acts as "an administrative aid to the court," *Feldman v. State Board of Law Examiners, supra,* 438 F.2d at 702, and "perform[s] a judicial function on behalf of the [court]," *Richardson v. McFadden,* 563 F.2d 1130, 1132 (4th Cir. 1977) (Hall, J., concurring), *cert. denied,* 435 U.S. 968 (1978); *see Application of Levine, supra,* 397 P.2d at 207.

Petitioners were thus acting as state officials, performing an essential state function in grading the bar examination. This fact leaves no room to apply the *Midcal* Test; peti-

tioners were entitled to state action immunity from the antitrust laws.

c. Even If The Midcal Test Were Applied, Petitioners Would Be Entitled To State Action Immunity

Assuming the Court of Appeals did not err in applying the *Midcal* Test to this case, it erred in concluding the petitioners had not met both aspects of the test.

According to the Court of Appeals, petitioners did not meet the "clearly articulated and affirmatively expressed state policy" prong of the *Midcal* Test.

> Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.

686 F.2d at 696; fn. omitted.

This reasoning is fallacious for several reasons. First, under Arizona Supreme Court Rule 28(c)(VII)(B), the committee was required to, and did, submit its proposed formula for grading the bar examination to the supreme court and to secure that court's approval of the formula. See 686 F.2d at 697. Second, unlike the defendants in *Goldfarb*, petitioners were not acting as private individuals or organizations but as state officials, members of the Arizona Supreme Court's Committee on Examinations and Admissions. While precision of regulation might be required to confer state action immunity on private individuals, such precision is not, and cannot be, required of state officials. Professor Areeda has noted:

> Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers

> necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, *supra* n. 4, 95 Harv.L.Rev. at 445 n. 49.

If the committee is to serve its function of assisting the Arizona Supreme Court, that court must be able to delegate tasks and discretion to the committee without thereby stripping committee members of their state action immunity.

Third, the Court of Appeal's opinion misconceives the purpose of the "clearly articulated state policy" requirement. The purpose of that requirement is to assure that the state has conscientiously considered and specifically decided to "displace unfettered business freedom with regulation" in a particular area of commerce. *New Motor Vehicle Bd. v. Orrin W. Fox Co., supra,* 439 U.S. at 109. The standard does not require the state to specify each particular detail of the acts necessary to carry out its regulatory scheme. It need only be shown that the challenged restraint is necessary to the successful operation of the regulatory scheme the state has established, and that the state has consciously determined to remove the area from free competition. *City of Lafayette, La., v. Louisiana Power & Light Co., supra,* 435 U.S. at 415.

The Arizona Supreme Court has plainly removed the area of admission to practice law from "unfettered business freedom." Arizona Supreme Court Rule 28(a) shows the court's considered determination to regulate bar admissions, in part through the committee. That is all that *Midcal's* first prong requires.

The *Midcal* Test also requires a showing of active supervision by the state itself. It is unclear why the Court of Appeals thought petitioners had not met this requirement. 686 F.2d at 697.

Since the Committee on Examinations and Admissions is a state agency, its own acts fulfilled the active state supervision requirement. Moreover, each of its acts was subject to active review by the Arizona Supreme Court. Under Arizona Supreme Court Rule 28(c)(VII)(B), the court reviewed and approved the committee's formula for grading the bar examination. Under Rule 28(a), that court reviewed and acted upon the committee's recommendations to grant or deny admission to the bar.[7] More active state supervision is difficult to imagine.[8]

Thus, even under the inapplicable *Midcal* Test, petitioners were entitled to state action immunity.

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[7]Arizona Supreme Court review is active. The court does not rubberstamp the committee's recommendations, but carefully considers them. The committee's recommendations are not always accepted. *See, e.g., Application of Klahr*, 102 Ariz. 529, 433 P.2d 977 (1967); *Application of Guberman*, 90 Ariz. 27, 363 P.2d 617 (1961); *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1957).

[8]Absurd results follow from use of the *Midcal* Test to analyze the antitrust immunity of the state's own agencies. A district court has just sustained a post-*Ronwin* immunity claim of a state agency, noting:

> "To ask if the state controls and reviews the DOT is to simply ask if the state exercises and governs over its own actions.
>
> • • • The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled and reviewed constantly by the state. Since the DOT accounts directly to the state, and the state, is merely acting through its agent, who performs and controls the action, this court can hardly imagine

3. The Noerr-Pennington Doctrine Immunizes Petitioners' Recommendations Regarding Bar Admissions

The Court of Appeals' decision reinstating Ronwin's antitrust complaint is erroneous for an independent reason. Petitioners' acts are constitutionally privileged against antitrust liability pursuant to the *Noerr-Pennington* doctrine.[9]

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and succeeding cases hold that in order to protect the freedom of association, the right to petition government and other freedoms guaranteed by the Bill of Rights, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions must be immunized from antitrust liability. 365 U.S. at 137-138; 381 U.S. at 669-671; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 513 (1972).

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how the *Midcal* analysis could fail to be satisfied. • • • [I]n such situations as the present case, the *Midcal* test is simply not necessary to be made. But if made, as here done, it will almost certainly be met."

Deak-Pereira Hawaii, Inc. v. Department of Transportation, State of Hawaii, No. 82-0334, ... F.Supp. ...., 44 A.T.R.R. p. 236 (D. Hawaii Jan. 3, 1983).

[9]The *Noerr-Pennington* issue was raised in the Court of Appeals by two amicus curiae briefs filed by the National Conference of Bar Examiners. It had not been raised in the district court and was not considered by the Court of Appeals. However, the applicability of *Noerr-Pennington* can be ascertained from the face of the complaint and the Arizona Supreme Court's rules, and it therefore can properly be raised and considered by this Court as an additional reason for affirming the district court's dismissal of the complaint. *Langnes v. Green*, 282 U.S. 531, 536-539 (1931).

Petitioners' acts as members of the Committee fell well within the scope of this immunity.

Petitioners were not authorized to, and did not, take final action on Ronwin's application for admission to the Arizona bar. Petitioners' sole function was to administer and grade the bar examination and recommend to the Arizona Supreme Court whether that court should grant or deny admission to applicants such as Ronwin. The Arizona Supreme Court, and only that court, has the power to grant or deny admission to the Arizona bar.[10]

Ronwin complains that for anticompetitive purposes petitioners gave his test too low a grade and for that reason recommended to the Arizona Supreme Court that he be denied admission. Those acts—grading the bar examination and recommending that the supreme court take

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[10]Arizona Supreme Court Rule 28(a) provides:

> The committee shall examine applicants and recommend to this court for admission to practice applicants who are found [qualified]. . . . The court will then consider the recommendations and either grant or deny admission.

The Arizona Supreme Court has repeatedly held that it is the committee's responsibility to consider the evidence and recommend to the court for admittance only those applicants who, in the committee's opinion, have satisfactorily established their qualifications. But "the ultimate responsibility for the admittance to the practice of law lies in the members of the Court," "using our independent judgment, de novo [to] determine whether the necessary qualifications have been shown." *Application of Levine, supra,* 397 P.2d at 207; *Application of Ronwin, supra,* 555 P.2d at 316; *Application of Klahr, supra,* 433 P.2d at 979.

specified action—could be nothing other than bona fide efforts to obtain or influence judicial action.[11]

Like the protesting dealers in *New Motor Vehicle Bd. v. Orrin W. Fox, Co., supra,* 439 U.S. at 110, petitioners merely invoked their right to governmental action in the form of a determination by the Arizona Supreme Court to grant or deny admission to particular applicants. The *Noerr-Pennington* doctrine immunizes their acts from antitrust liability.

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[11]Ronwin made no effort to plead that petitioners' acts fell within the "sham" exception to *Noerr-Pennington*, and could not do so. Petitioners were, in fact, seeking to influence the Arizona Supreme Court's actions, and did not recommend his non-admittance to obtain an anticompetitive advantage through any other means. Of course, Ronwin's allegation of anticompetitive purpose is insufficient to place this case within the "sham" exception. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* 365 U.S. at 139-140; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1264 (9th Cir. 1982), petition for certiorari filed, 51 U.S. L.W. 3512 (U.S., Jan. 3, 1983, No. 82-1110).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 2, 1983

(Appendices follow)

Appendix A

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, Carlock, George Read and Wanda Myers, Robert D. and Judith Wolfinger, Harold J. and Jane Doe Richmond, James L. and Jane Doe Karman, Howard H. and Jane Doe Hoover, Charles R. and Jane Doe, Defendants-Appellees.*

No. 80-5004.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

As Amended on Rehearing Sept. 8, 1982.

Appeal from the United States District Court for the District of Arizona.

Before FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,† District Judge.

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*(Petitioners' footnote) The caption reflects a clerical error by the Court of Appeals. In the District Court, Ronwin sued the State Bar of Arizona; George Read Carlock and Wanda Carlock, Husband and Wife; Robert D. Myers and Judith Myers, Husband and Wife; Harold J. Wolfinger and Jane Doe Wolfinger, Husband and Wife; James L. Richmond and Jane Doe Richmond, Husband and Wife; D. Thompson Slutes and Jane Doe Slutes, Husband and Wife; Howard H. Karman and Jane Doe Karman, Husband and Wife; and Charles R. Hoover and Jane Doe Hoover, Husband and Wife, all of whom except the Slutes (who had not been served) were appellees in the Court of Appeals.

†The Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

HATTER, District Judge:

Ronwin sued the Arizona State Bar ("Bar") and the individual members (and their spouses) of the Committee on Examinations and Admissions of the Arizona Supreme Court ("Committee"), alleging that they had violated federal antitrust laws in grading the 1974 Arizona bar examination that Ronwin failed. The district court denied Ronwin's motion for recusal and dismissed the action for failure to state a claim, lack of jurisdiction, and lack of standing. We affirm the denial of the recusal motion, but reverse the dismissal decision as to the individual committee members[1] and remand for further proceedings.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. He was notified two months later that he had failed the examination. The Arizona Supreme Court refused to review his exam, and the United States Supreme Court denied certiorari. *See Ronwin v. Committee on Examination and Admissions*, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).[2]

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[1]Although the Committee is appointed by the Arizona Supreme Court from a list of nominees chosen by the Bar's Board of Governors, it is not, as such, a committee of the State Bar. Because no specific allegations of wrongdoing have been made against the Bar, the dismissal for failure to state a claim was proper as to the Bar. For the same reason, we affirm the dismissal as to the spouses of the individual committee members.

[2]Ronwin applied to retake the bar examination in July, 1974, but was denied permission because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law." *See* Ariz.Sup.Ct.R. 28(c)(IV)(5). A special committee conducted a formal hearing regarding the alle-

Ronwin filed this antitrust action in March, 1978, alleging that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally restricting competition among attorneys practicing in Arizona. The essence of Ronwin's complaint is that the Committee graded the exam to admit a predetermined number of persons, without reference to "achievement by each bar applicant of a pre-set standard [of competence]." For purposes of their motion to dismiss, defendants did not challenge the accuracy of Ronwin's allegations.[3]

At the time Ronwin took the bar exam, the Committee was authorized to determine whether bar applicants possessed the "necessary qualifications and . . . fulfill[ed] the requirements prescribed by the [Bar] board of governors as approved by [the Arizona Supreme Court] . . . ." Ariz. Sup.Ct. Rule 28(a)(1973) (amended in 1975 to create two separate committees). The Committee consists of seven active members of the State Bar who, upon the recommendation of the Bar's Board of Governors, are appointed by the Arizona Supreme Court. *Id.* As Ronwin noted in paragraph II of his complaint, the State Bar is a private

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gations of mental unfitness under Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee declined to find Ronwin mentally fit to practice law. The finding of unfitness was affirmed by the Arizona Supreme Court. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977).

[3]On remand, however, it may be necessary to determine the manner in which the 1974 examination was graded. Specifically, the court should determine whether the examination was graded as Ronwin alleges, or was graded on a different basis, such as a "scaled" formula, designed to equalize the difficulty of the exam over various years with the pass-fail determination being based on individual merit rather than numerical quota.

entity to which all Arizona lawyers belong, and the individual defendants were members of "the Committee . . . and, as such, presided over and conducted the process by which applicants for membership in [the] Bar were examined. . . ."

II

DISMISSAL OF RONWIN'S ACTION

The district court gave three reasons for dismissing the action: (1) the complaint failed to state a claim upon which relief could be granted; (2) the court lacked jurisdiction over the subject matter; and (3) Ronwin lacked standing to seek the relief requested. These reasons will be discussed seriatim.

A. *Failure to State a Claim—State-Action Immunity*

The district court's ruling that Ronwin had failed to state a claim was apparently based on its acceptance of defendants' argument that bar grading procedures are immune from federal antitrust laws. Relying primarily on *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the defendants argue that, even assuming, *arguendo*, the grading formula was anticompetitive, the Committee's status as a state agent renders its actions absolutely immune from antitrust liability. We disagree.

In *Bates*, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the state-action exemption first announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

433 U.S. at 359-61, 97 S.Ct. at 2696-97. The Court stressed that the real party in interest was the Arizona Supreme Court because it had adopted the challenged restraint. Because the challenged restraint had been specifically adopted by the state acting, through the State Supreme Court, as sovereign, it therefore reflected a clear and affirmative articulation of state policy. *Id.* at 361-62, 97 S.Ct. at 2697-98. In the present case, by contrast, the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court.

In a more analogous case, the Supreme Court held that the activities of a county and a state bar association in publishing and enforcing a minimum-fee schedule were not shielded by the state-action exemption. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92, 95 S.Ct. 2004, 2013-15, 44 L.Ed.2d 572 (1975). The Court stated:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown*, 317 U.S. at 350-352 [63 S.Ct. at 313-14]; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-07 [82 S.Ct. 1404, 1414-15, 8 L.Ed.2d 777] (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or

> require the type of price floor which arose from respondents' activities. . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15.

Subsequent Supreme Court decisions underscore the distinction between *Bates* and *Goldfarb*. The Court has repeatedly emphasized in these more recent decisions that for the state-action exemption to apply the challenged restraint must be clearly articulated and affirmatively expressed as state policy and be actively supervised by the state itself. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410-13, 98 S.Ct. 1123, 1135-36, 55 L.Ed.2d 364 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); *Community Communications Co. v. City of Boulder*, ... U.S. ....., ..., 102 S.Ct. 835, 839-41, 70 L.Ed.2d 810 (1982). The failure to meet either requirement precludes application of the antitrust immunity. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943.

Viewing the present case at this stage of the proceedings in light of the Court's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy," *Midcal's* first require-

ment. *Id.* Like the defendants in *Goldfarb,* the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.[4] *See* 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

The fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement" over actions of the Committee that were not affirmatively expressed as state policy by the Arizona court. *Midcal,* 445 U.S. at 106, 100 S.Ct. at 943. As the Court emphasized in *Goldfarb,* "[i]t is not enough that, as the . . . Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. *Accord, Phonetele, Inc. v. American Telephone and Telegraph Co.,* 664 F.2d 716, 736 (9th Cir. 1981).

The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants

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[4]The challenged policies in *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 275-76 (9th Cir. 1982) (as amended), in contrast to this case, were explicitly mandated by statute.

assert, dispositive in itself of the state-action question.[5] Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker*, *Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state department. 317 U.S. at 344, 63 S.Ct. at 310; 439 U.S. at 103, 99 S.Ct. at 408; 445 U.S. at 100, 100 S.Ct. at 940. In *City of Lafayette*, 435 U.S. at 408, 98 S.Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. *See City of Boulder*, ... U.S. at ....., 102 S.Ct. at 842.

The question remains whether the challenged restraint allegedly fashioned by the Committee was sufficiently "articulated" and "supervised" by the Arizona Supreme Court. Standing alone, the fact that the court established the Committee and selected its members does not affect the

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[5] As in *City of Boulder* and *City of Lafayette*, "[t]his case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants . . . [or to] confront the issue of remedies appropriate against [public] officials." *City of Boulder*, . . . U.S. at . . . n.20, 102 S.Ct. at 843 n.20. *Accord, City of Lafayette*, 435 U.S. at 401-02, 98 S.Ct. at 1130-31.

reasoning underlying our conclusion that the challenged grading procedure was not clearly articulated and affirmatively expressed as state policy, *Midcal*'s first requirement.

Effective January 15, 1974, 45 days before the examination Ronwin failed, the Arizona Supreme Court adopted Rule 28(c)(VII)(B) which requires the Committee to file its proposed grading formula with the Supreme Court at least 30 days before each examination. This review procedure was not brought to the attention of the district court either in the pleadings or in the papers pertaining to the motion to dismiss; nor did the parties mention it in their briefs or arguments to this court.

Defendants contend for the first time on rehearing that the Committee's grading formula "was submitted to the Court, reviewed by the Court, and accepted by the Court." In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c)(VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore improper on the basis of the information before the district court.

Our resolution of the state-action issue is not inconsistent with this court's prior decisions in *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968); and *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). Those decisions do not support the contention that bar grading procedures are always shielded by state-action immunity, that such procedures may be challenged only on constitutional grounds, or that the Arizona Supreme Court was the proper defendant in this case. Those cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights.[6]

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[6]The statement in *Brown* that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature . . . ," 623 F.2d at 609, refers to § 1343 actions like those at issue in *Brown*, *Hackin*, and *Chaney* because, as the *Brown* court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need look no farther than *Goldfarb*, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures. As the court explained in *Brown*, the state supreme court is the proper party when it has promulgated the specific challenged rule. 623 F.2d at 608 n.6.

In *Hackin*, as the *Brown* court noted, the court emphasized that the admission rule at issue, barring graduates of unaccredited law schools from taking the bar exam, was directly promulgated and enforced by the state supreme court. 361 F.2d at 500-01. In *Chaney*,

The national policy in favor of competition, *Midcal,* 445 U.S. at 106, 100 S.Ct. at 943, should not be thwarted absent a clear articulation by the Arizona Supreme Court that it had adopted the alleged grading policy. Absent such a declaration, Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being designed to ensure that attorneys had the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the defendants enjoy absolute state-action immunity.

B. *Subject Matter Jurisdiction—Interstate Commerce*

The Sherman Act's requirement of interstate commerce, 15 U.S.C. § 1, is jurisdictional. *See Western Waste Service Systems v. Universal Waste Control,* 616 F.2d 1094, 1097 (9th Cir.), *cert. denied,* 449 U.S. 869, 101 S.Ct. 205, 66 L. Ed.2d 88 (1980); *see generally McLain v. Real Estate Board,* 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). The district court evidently found that the alleged restraint did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act. Defendants contend that the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint because bar admission is a purely local matter. Ronwin responds that the services

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the court's discussion clearly concerns finality and the nature of the plaintiff's claim, and has no relevance to the issues of state action or proper parties. *See* 386 F.2d at 966-67. It should also be noted that the *Chaney* court discusses the plaintiff's restraint of trade contention (similar to Ronwin's claim) at length, and rejects it on factual rather than jurisdictional grounds. *Id.* at 965. Thus, these decisions offer no support for the contention that there is a blanket rule making state supreme courts the only proper defendants in all bar admissions cases.

of Arizona lawyers are required by people living outside Arizona. The price paid by these out-of-state clients for legal services performed by Arizona lawyers is, according to Ronwin, higher than it would be if the number of Arizona lawyers had not been artificially restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself *in commerce* or (2) "has an *effect on* some other appreciable activity demonstrably in *interstate commerce*." *McLain*, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the past confusion surrounding these tests, we will consider Ronwin's allegations of interstate commerce under both the "in commerce" and the "effect on commerce" tests. *See Bain v. Henderson*, 621 F.2d 959, 960 n.1 (9th Cir. 1980).

(1) *The "in commerce" test*: The most applicable Supreme Court decision applying the "in commerce" test is *Goldfarb v. Virginia State Bar*, 421 U.S. at 783-86, 95 S.Ct. at 2011-12. In *Goldfarb*, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions that require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. The Court reasoned that any restraint on those services therefore had a substantial effect on interstate commerce. *Id.* at 785, 95 S.Ct. at 2012.

Ronwin did not specifically plead which interstate transactions require legal services. *See Bain*, 621 F.2d at 961. Nor did he indicate how substantial an effect on interstate commerce results from restricting the number of lawyers

practicing in Arizona. It is not inconceivable, however, that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, the district court erred in dismissing the complaint for that reason at this stage of the proceedings. *See McLain*, 444 U.S. at 246, 100 S.Ct. at 511 (a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief).

(2) *The "effect on commerce" test*: In *McLain*, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had alleged facts sufficient to show that defendants' conduct affected interstate commerce.[7] *McLain*, 444 U.S. at 245, 100 S.Ct. at 510. Specifically, the Court noted indications in the record that: (1) "an appreciable amount of commerce [was] involved in the financing of residential property in the Greater New Orleans area" and the commerce involved various interstate institutions, *id.* at 245, 100 S.Ct. at 510; and (2) the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." *Id.* at 246, 100 S.Ct. at 511.

Ronwin did not allege either that there are an appreciable number of interstate transactions taking place in Arizona that require legal services or that limiting the

[7]The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. *McLain*, 444 U.S. at 242, 100 S.Ct. at 509.

number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is also true under the "in commerce" test, it is not inconceivable that Ronwin could establish jurisdiction under the "effect on commerce" test. *See, e.g., McLain,* 444 U.S. at 245-47, 100 S.Ct. at 510-11; *Western Waste Service,* 616 F.2d at 1097-99. Therefore, on remand, the district court should give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of these tests.

C. *Standing*

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the alleged antitrust violation. 15 U.S.C. § 15; *Solinger v. A&M Records, Inc.,* 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied,* 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). Defendants contend that even if they committed an antitrust violation, the violation did not cause Ronwin injury because he was subsequently found mentally unfit to engage in the practice of law. Thus, according to defendants, even if Ronwin had passed the exam, he would not have been admitted to practice in Arizona.

The flaw in the defendants' argument is that Ronwin was not found mentally unfit to practice law by the Arizona Supreme Court until July of 1976, twenty-seven months after Ronwin's exam results were released.[8] If Ronwin had

[8]Although the Committee on Examinations and Admissions declined to certify that Ronwin was "mentally fit" to practice law when he applied to retake the bar exam in July, 1974, and the special committee appointed by the Arizona Supreme Court upheld

passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit. Because defendants' alleged illegal restraint precluded Ronwin from practicing law in Arizona for an appreciable period of time, Ronwin has sufficiently alleged that he was injured by reason of an unlawful practice. *See Kapp v. National Football League*, 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). *Cf. Solinger*, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that allegedly foreclosed his ability to enter market). Although his allegations of damages suffice to confer standing, Ronwin will still have to prove that defendants' actions caused him actual damages in order to recover.[9]

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that determination on January 21, 1975, it was not until July, 1976 that the Arizona Supreme Court affirmed the finding. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). Defendants do not contend either that Ronwin would have been denied admission in 1974 because of his alleged unfitness to practice had he passed the exam or that he would not have been allowed to practice law pending the Arizona court's decision on the matter. It would be inappropriate for this court to speculate on the matter.

[9]Assuming that Ronwin is able to clear the various hurdles still before him, it may be necessary to determine whether he would have passed the bar examination if graded on a proper basis. If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged improper method of restricting bar admission, the district court may so order and supervise such a procedure for the sole purpose of determining whether Ronwin has been damaged. If the court decides that such a remedy is no longer feasible under the circumstances of this case, it would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, 1974 when he would have been admitted to the Bar, and July, 1976, when the Arizona Supreme

III

THE RECUSAL QUESTION

Ronwin appeals the denial of his recusal motion. The district judge was also presiding at that time over other actions in which Ronwin was a party. Ronwin set forth, in various affidavits and motions, facts which he contends indicated that the judge was biased and prejudiced against him. He contends that the judge was therefore required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.[10]

The test for disqualification is the same under sections 144 and 455(b)(1). *United States v. Sibla*, 624 F.2d 864,

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Court found him unfit to practice law. *See Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981) (special solicitude for proof of damages when defendant's conduct has been a factor in speculative nature of damages), *cert. denied*, ... U.S. ..., 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

[10]28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section, the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. *See United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

867 (9th Cir. 1980). That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980). In evaluating a judge's impartiality, the bias or prejudice "must stem from an *extrajudicial source*." *Azhocar*, 581 F.2d at 739 (emphasis in original). We review the denial of a recusal motion for abuse of discretion. *Sibla*, 624 F.2d at 868-69.

Ronwin's specific allegations of bias or prejudice involve judicial acts which the district judge either performed or failed to perform while presiding over the other actions in which Ronwin was a party. None of these actions involved extra-judicial acts which would indicate, on their face, prejudice or bias. Adverse rulings by themselves do not constitute the requisite bias or prejudice. *Azhocar*, 581 F.2d at 738-39. Ronwin also contends that the judge was prejudiced against him because the judge was a defendant in an action brought by Ronwin. However, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). Such an easy method for obtaining disqualification should not be encouraged or allowed.

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28 U.S.C. § 455 provides, in part, that:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party . . . .

Finally, Ronwin contends that the judge's alleged participation in *ex parte* communications with defense counsel indicated the judge's prejudice. Although a judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144, *Azhocar*, 581 F.2d at 739, Ronwin's allegation of *ex parte* communications relates to facts that were peculiarly within the judge's knowledge.[11] Given the judge's emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such alleged communications indicated the judge's prejudice, the judge did not abuse his discretion by denying Ronwin's motion.

IV
CONCLUSION

We conclude that the district court did not abuse its discretion in denying the motion for recusal. We also conclude, however, that the court erred in dismissing the action as to the individual Committee members, and remand for further proceedings consistent with this opinion.[12]

AFFIRMED in part; REVERSED in part, and REMANDED.

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[11]Ronwin's allegation of *ex parte* communication between the judge and defense counsel was based on the fact that the counsel, in setting a hearing date on defendants' motion to dismiss, knew when the judge would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through *ex parte* communications with the judge. Counsel explained, however, that he knew the judge would be in Phoenix on the day he suggested for a hearing because he had received an order from the court in another case assigned to the judge setting the same date for a hearing in the other case.

[12]We note that many of the remaining issues may be suitable for resolution by means of summary judgment.

FERGUSON, Circuit Judge, dissenting:

It is now the law in this circuit that a person who has been judicially determined to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a $1,200,000 damage action under the federal antitrust laws against the Committee on Examinations and Admissions of the Arizona Supreme Court and the Committee's members[1] for failure to give him a passing grade on the state bar examination!

Precedents in this circuit and the Supreme Court mandate that when the grading procedures of the board of bar examiners are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover,

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[1]The majority has dismissed spouses of the committee members for the perplexing reason that no specific allegations of wrongdoing have been made against the spouses. Maj. op., note 1, *ante*. However, in Arizona plaintiffs join spouses as defendants to reach their community property, not because the spouses are wrongdoers. A.R.S. § 25-215 requires that a cause of action based upon a community obligation be brought against both husband and wife. *Eng v. Stein*, 123 Ariz. 343, 599 P.2d 796 (1979). A community obligation is incurred when, for example, a husband's tort is committed in furtherance of the community's interest. *Howe v. Haught*, 11 Ariz.App. 98, 462 P.2d 395 (1969). In fact, plaintiff pleaded, "The male Defendants all acted on their own behalves and on behalf of their respective marital communities." Whether defendants actually acted on behalf of their marital communities is a question that the district court did not address and that the majority does not address. Since the case is remanded, resolution of this material issue should have been left to the district court. That plaintiff did not specifically allege that defendants' spouses are wrongdoers is wholly immaterial.

The majority's expansive interpretation of antitrust law contrasts nicely with its restrictive view of plaintiff's remedies. The effect of dismissing defendants' spouses from the action is that now plaintiff may recover only from the separate property of defendants. *See Eng v. Stein, supra*, 123 Ariz. at 346, 599 P.2d at 799.

because the action of the state supreme court is state action within the *Parker* exception, that action is immune to an antitrust attack. Further, the impact of the actions alleged by plaintiff are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR ADMISSION.

A. *Proper Defendant*

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In *Hackin v. Lockwood,* 361 F.2d 499 (9th Cir.), *cert. denied,* 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court. Hence, the State Committee on Examinations and Admissions was not a proper defendant because it was merely a committee of the Arizona Supreme Court with powers delegated by the court. *Id.* at 500.

In *Hackin,* plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

> The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or

> change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court.
> . . .
>
> In the original complaint, but not in the amended complaint, appellant names as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court. . . .

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in *Chaney v. State Bar of California,* 386 F.2d 962 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal of the State Bar Committee to certify an applicant was not a terminative step in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the Committee's recommendation. *Id.* at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. Thus, the Committee cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission . . .," which matters remain ultimately in the court. *Id.* If the plaintiff is deprived of a right, it is the state supreme court, not the

Committee on Examinations and Admissions, that is the source of the deprivation.

These decisions were reaffirmed in *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in *Hackin* and reemphasized in *Chaney*,[2] *id.* at 608. *See also Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) (reaching similar conclusion).

The harm suffered by the plaintiff, if any, is that resulting from the Arizona Supreme Court's refusal to admit

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[2]In *Brown*, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Examiners as improper parties under *Hackin*, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

> We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

Id. Clearly, the court allowed the two parties to appeal because they were aggrieved. In dictum, the court said that *Hackin*, involving a challenge to the validity of a state supreme court rule governing admission to the bar, did not apply to make the state bar and the board improper defendants, since these were the only parties who could "physically comply" with an injunction requiring the defendants to let the plaintiff sit for the bar. *Id.* at 608 & 608 n.6. Even assuming the correctness of that dictum, it has no application to this case. Ronwin complains not of the failure of the state bar to seat him for the exam—he failed it—but of the failure of the supreme court to admit him. Admission to the bar is within the province of the supreme court, not the state bar, nor the committee.

him to the bar. Accordingly, Ronwin cannot sue the Committee on Examinations and Admissions of the Arizona Supreme Court.

B. *Limitations on Challenges*

Court review of state procedures for admission and testing is guided by the rational basis standard. *Chaney v. State Bar, supra,* at 964; *Tyler v. Vickery,* 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied,* 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).[3] While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. *Willner v. Committee on Character & Fitness,* 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). *Brown v. Board of Bar Examiners, supra,* established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, *Brown* stated, "The only constraints on the states' exclusive jurisdiction are constitutional in nature. . . ." 623 F.2d at 609.

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[3]A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. *Shenfield v. Prather,* 387 F.Supp. 676 (N.D.Miss.1974). A state may validly require an applicant to pass an examination in essay form. *Chaney v. State Bar, supra.* A state may allow state graduates to waive examination without denying equal protection to other applicants. *Huffman v. Montana Supreme Court,* 372 F.Supp. 1175 (D.C.Mont.), *aff'd,* 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are tabulated. *Hooban v. Board of Governors of Washington State Bar Ass'n,* 85 Wash.2d 774, 539 P.2d 686, *app. dism'd,* 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. *Tyler v. Vickery, supra.*

Brown outlined the alternatives available to an unsuccessful applicant:

> Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2197, 53 L.Ed.2d 227 (1977).
>
> In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules of procedures do not impinge on constitutionally protected rights. Federal courts have frequently entertained challenges to rules controlling admission to the bar, and have almost without exception sustained the validity of such rules. [Citations omitted].
>
> On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court . . . ." *Mackay v. Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act. *In re Summers*, 325 U.S.

> 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. *See Schware v. Board of Bar Examiners, supra,* 353 U.S. at 238, 77 S.Ct. at 755; *Konigsberg v. State Bar of California,* 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, supra, at 609-10 (citations omitted). The plaintiff in *Brown* attempted the only viable challenge to state bar admission procedures—a constitutional challenge. *Brown* denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. *Brown, supra,* at 611.

C. *The Majority Opinion*

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such deference has never existed toward the state's ability to regulate fees, the majority's reliance on *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. *Brown,* 623 F.2d at 609. Finally, *Brown* held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admission cases. In addition, jurisdiction is al-

lowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to those unsuccessfully challenged in *Brown*. *Id.* at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raises no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION.

The *Parker* antitrust exemption is grounded in our federal system:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). The unfortunate effect of the majority opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, is applicable to antitrust cases, in which Congress exercises its powers under the commerce clause. *See Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423, 98 S.Ct. 1123, 1142, 55 L.Ed.2d 364 (1977) (Burger, C. J., concurring in Part I of the Court's opinion and in the judgment); *id.* at 430, 98 S.Ct. at 1145 (Stewart,

J., dissenting). I would think that regulation of bar admissions is an "integral operation in the area of traditional government functions." *See id.* at 424, 98 S.Ct. at 1142 (Burger, C. J.). For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent. The state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency of the state, that is, the Committee on Examinations and Admissions of the Arizona Supreme Court, is exempt from antitrust laws. The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was *required* by the state supreme court. The majority answers: "Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly *requiring* the challenged grading procedure." Maj. op., *ante*, at 696 (emphasis added).

However, the test of compulsion in *Goldfarb, supra*, applied only to private conduct of the county bar association and to the State Bar's joinder in that private conduct. In *Goldfarb*, the private county bar association adopted a fee schedule and the State Bar, "by providing that deviation from County Bar minimum fees may lead to disciplinary action . . . voluntarily joined in what is essentially a private anticompetitive activity." *Goldfarb, supra*, at 791-92, 95 S.Ct. at 2015-16.

In analyzing the application of the compulsion test to the antitrust immunity of public and private defendants, Professor Areeda has wisely remarked:

> The Supreme Court and lower courts have not applied the compulsion language literally. In *Midcal*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980), the Court defined the criteria for immunity not in terms of compulsion but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation and review, but not command. *Id.* at 105-06 [100 S.Ct. at 943-44]. And in *Parker*, 317 U.S. at 346-47 [63 S.Ct. at 311-12], the anticompetitive output limitations ultimately enforced by public officials originated in proposals from the beneficiaries.
>
> Lower courts employ the rhetoric of compulsion found in *Goldfarb* and *Cantor*, but immunize private action that is essential to a state regulatory scheme. . . .
>
> • • • • • •
>
> Compulsion is not necessary in cases of *public* defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 438 n.19, 445 n.49 (1981).

In the instant case, the defendants are the committee and its members, a state agency and officials acting within their general ambit of authority granted by the Arizona Supreme Court. Since the activity of public defendants is involved, the proper test for antitrust immunity is the one

found in *City of Lafayette, supra*. The plurality in *Lafayette* concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation." *Id.* at 413, 98 S.Ct. at 1137. An adequate mandate for state anticompetitive activity exists when it is found, from the authority given a governmental entity to operate in a particular area, that "the kind of action complained of" was contemplated. *Id.* at 415, 98 S.Ct. at 1138.

Thus, the proper test to apply to the action of the Committee is one of state authorization, not one of compulsion. In deciding whether the action of the Committee was authorized, it is necessary to consider whether the Committee acted "pursuant to state policy to displace competition with regulation," *City of Lafayette, supra*, at 413, 98 S.Ct. at 1137, and whether that policy was "clearly articulated and affirmatively expressed." *Community Communications Co., Inc. v. City of Boulder*, ... U.S. ....., ..., 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).[4]

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[4]I recognize that the majority believes an additional element of the immunity test is whether the state policy is "actively supervised by the state itself." Maj. op., *ante*, at 696. Professor Areeda, however, observes that the Supreme Court has not yet required that *governmental* acts be supervised by the state. Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 445 & 445 n.50.

The cases cited by the majority do not apply the supervision test to public defendants—and, of course, the Committee and its members are such defendants. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed. 2d 364 (1978), quotes the "active supervision" language of *Bates*, without applying any such test. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978), makes no mention of an "active supervision"

There can be no doubt that it was the policy of the Arizona Supreme Court—and, of course, the policy of the

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test. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), applies the test to a *private* defendant. Finally, *Community Communications Co. v. City of Boulder*, ___ U.S. ___ n.14, 102 S.Ct. 841 n.14 (1982), expressly refused to reach the issue of whether active state supervision was required.

Were the *Midcal* test of "active supervision" to be extended to include public defendants, I have no doubt that the test would be satisfied in the instant case by the Arizona Supreme Court's review. Ariz.Sup.Ct. Rule 28(a)(1970); Ariz.Sup.Ct. Rule 28(c)VII(B) (1974).

The majority declares that a triable issue remains as to whether the submission made by the Committee to the supreme court pursuant to Rule 28(c) was adequate to enable the supreme court to engage in the kind of active supervision which the majority concludes is required before the state action exemption will be available.

Supreme Court Rule 28(c), as in effect at the relevant time, required the Committee to file its grading formula with the supreme court 30 days before the bar examination. As the majority notes, it apparently did not come to the attention of the district court, nor to this court until quite recently, that this rule was in effect at the time the conduct complained of by Ronwin occurred. However, this supreme court rule has the force of law, and the court can—indeed must—consider it in deciding whether the Committee's conduct was actively supervised by the court.

In addition to considering the effect of Rule 28(c), however, the majority has also given weight to evidence not presented to the district court, and indeed not presented to this court until long after oral argument, purporting to bear on the actual nature of the submission made pursuant to Rule 28(c). The record made by the parties in the district court contains no evidence whatsoever that would suggest any failure by the Committee to adequately inform the supreme court of its grading policies and procedures. I find it irregular for the court of appeals to go outside the record to decide an appeal from a dismissal by the district court. As a matter of due process, the parties have a right to have their appeal heard on the basis of the factual record assembled in the court below.

state's highest court is that of the state, *see Bates v. State of Arizona*, 433 U.S. 350, 360, 97 S.Ct. 2691, 2697, 53 L.Ed. 2d 810 (1977)—to displace competition with regulation. Indeed, any effort to limit admission to the bar will limit the open competition of the market place. As part of the regulatory scheme, the supreme court adopted a rule directing its Committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Rule 28(a) (1970). Surely this authorization by the Arizona Supreme Court "contemplates" that its Committee would engage in the "kind of action complained of" by plaintiff, namely, the establishment of bar admission standards and grading procedures.

The majority relies on *Goldfarb*, rather than *Bates*, *supra*, as analogous to the instant case. Though neither *Goldfarb* nor *Bates* is an exact replica of the case at hand, *Bates* is more directly on point. *Goldfarb* would be more relevant if, in the instant case, the Arizona Supreme Court had rejected the Committee's procedures; the state supreme court in *Goldfarb* had warned the state bar against enforcing the challenged fee schedules. *Goldfarb*, *supra*, at 789, 95 S.Ct. at 2014. In contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures.[5] This implied validation of the board's grading system renders *Bates* the more direct and proper analogy.

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[5]In further contrast, the defendant in the instant case is a public defendant carrying out a state policy, whereas the defendants in *Goldfarb* were the private county bar and the state bar joining in essentially private activity. *See* dissent . . . *supra*.

In *Bates*, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to monopolize. In the instant case, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in *Bates*.

The majority has relied on two cases in which no antitrust immunity was found for cities charged with antitrust violations. *City of Lafayette, supra; City of Boulder, supra*. Those cases are inapposite, as they involve actions by cities. Such action deserves close scrutiny, as there is justifiable concern that a city may advance local, parochial interests, rather than the interests of the people of a state. The federalist compromise, of course, only provides antitrust immunity where the state's interests are concerned. In the instant case, however, an arm of the state supreme court, not a city, is doing the regulating. Moreover, the regulation concerns a matter of statewide interest —the qualifications of admittees to the bar—not a matter of local concern. The regulation of admission to the bar is at the core of the state's power to protect the public.

City of Boulder, supra, actually lends support to the position that antitrust immunity should apply in the case at hand. In explaining why antitrust immunity should not

be conferred on a city exercising home rule powers granted by the legislature, the Court in *City of Boulder* stated:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State.

City of Boulder, supra, ... U.S. at ....., 102 S.Ct. at 843 (emphasis in original). By no stretch of the imagination has the Arizona Supreme Court taken a position of "neutrality" allowing the Committee to do as it pleases. To the contrary, the Arizona Supreme Court has affirmatively addressed the subject matter of this suit by granting to the Committee the power to examine applicants and to recommend for admission to the bar those who are found to have the necessary qualifications.[6]

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[6]Arizona Supreme Court Rule 28(a) (1970), which assigns to the Committee the duty of screening applicants, provides in pertinent part:

> The committee shall examine applicants and recommend to this Court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this Court respecting examinations and admissions. . . . The Court will then consider the recommendations and either grant or deny admission.

I am concerned that the majority, by holding that the anticompetitive action in this case was not authorized by the state and is not shielded by the state antitrust immunity, has opened wide the door to antitrust scrutiny of virtually all acts by agents and officials of the state who carry out policies of statewide concern. The foreseeable consequence of multiplication of antitrust actions accompanied by the threat of treble damages will be timorous decision-making by state officials entrusted with the public interest. The day when every act of an agent or official of the state who has been delegated power pursuant to state policy becomes subject to scrutiny for violation of the antitrust laws will be the day that our federalism has become gravely weakened.

III. ALLEGED IMPACT ON COMMERCE.

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market. *Gough v. Rossmore Corp.*, 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Plaintiff's complaint neither identifies a relevant market nor alleges a substantial impact on such a market. A court should give a party the opportunity to demonstrate the elements of his case if his claim presents the possibility that he may prove substantial impact. However, on the facts of this case, plaintiff could not demonstrate more than the trivial impact of a curved grading system. The ability of applicants to reapply permits them to remain within the potential commerce stream.

In addition, the opinion relies on *McLain v. Real Estate Board*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980),

for the proposition that Ronwin could "conceivably" demonstrate impact on the relevant market. The relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in *Ronwin* does not flow from the facts of *McLain*.

CONCLUSION

For the foregoing reasons, I dissent.

Appendix B

In the United States District Court
For the District of Arizona

NO. CIV 78-193 PHX MLR

Edward Ronwin,
Plaintiff,

vs.

State Bar of Arizona, et al.,
Defendants.

[Filed Oct. 9, 1979]

ORDER AND JUDGMENT

This cause came on to be heard before the Court on the following motions:

1. Motion of plaintiff seeking recusal of judge.

2. Motion of defendants to dismiss the complaint.

The Court, having considered the pleadings, the memoranda of points and authorities filed by the parties and the argument of counsel for defendants, plaintiff having waived his appearance and having waived oral argument on his motion seeking recusal of judge, finds as follows:

1. Plaintiff's motion seeking recusal of judge is legally insufficient.

2. The allegations of the complaint fail to state a claim upon which relief can be granted.

3. The Court lacks jurisdiction of the subject matter.

4. The plaintiff lacks standing to seek the relief requested.

Now, therefore, it is Ordered and Adjudged as follows:

1. The motion of plaintiff seeking recusal of judge is hereby denied.

2. The motion of defendants to dismiss is hereby granted.

3. The Clerk is hereby directed forthwith to enter judgment in favor of the defendants, and each of them, and against the plaintiff.

4. Defendants' costs shall be taxed pursuant to law.

Done in Open Court this 23d day of March, 1979.

United States District Judge